In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1159

ARNOLD F. HABIG AND JEROME M. SCHROERING,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet officially reported. The suppression order of the district court (Pet. App. B) is not reported. The decision of the court of appeals on a prior appeal by the United States from a suppression order (Pet. App. C) is reported at 413 F. 2d 1108, certiorari denied, 396 U.S. 1014.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. E) was entered on January 24, 1973. The petition for a writ of certiorari was filed on February 22, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]In an earlier case involving this prosecution, *United States v. Habig*, 390 U.S. 222, this Court reversed the judgment of the district court dismissing certain counts of the indictment as barred by the statute of limitations.

QUESTIONS PRESENTED

1. Whether, in a tax fraud investigation conducted jointly by a revenue agent and a special agent of the Internal Revenue Service, corporate officers who are not in custody or subject to any restraint are entitled to receive *Miranda* warnings before being requested to furnish corporate records relevant to the tax liabilities of the corporations whose tax returns are being investigated.

2. Whether the prior concession by the government that petitioners, as corporate officers, had standing to raise a motion to suppress evidence obtained in the course of a search of corporate records estops the government from contending that the searches were in fact reasonable and lawful.

STATEMENT

1. In 1966, petitioners were indicted in the United States District Court for the Southern District of Indiana for attempting to evade taxes of corporations of which they were officers, in violation of 26 U.S.C. 7201, and for aiding in the preparation of false corporate tax returns, in violation of 26 U.S.C. 7206(2). The district court dismissed two counts of the indictment and, on direct appeal by the government, this Court reversed. *United States* v. *Habig*, 390 U.S. 222.

Petitioners then filed a motion for the suppression and return of all photocopies of corporate records made by investigating Internal Revenue Service agents (I R. 13-14).[2] The basis of the motion was that no search warrant, subpoena, or summons had been served upon either petitioner for such records and that neither petitioner had been warned by any agent that he was being investigated for criminal tax violations. The government conceded

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[2] "I R." refers to the appendix filed in the court of appeals in connection with the first appeal from the district court's suppression order. "II R." refers to the appendix filed in the court of appeals in the instant proceedings.

that petitioners would be aggrieved persons if the corporate records had been illegally seized but denied that the search and seizure were unlawful (I R. 73, 75). The district court found that in December 1963 the investigation had been referred to the Intelligence Division of the Internal Revenue Service and at that point had become focused on the possibility of criminal tax violations (I R. 27-30). The court thereupon suppressed all the corporate records examined and copied after 1963.

On appeal by the government from the suppression order, the case was heard and decided by the court of appeals together with *United States* v. *Dickerson*, 413 F. 2d 1111 (C.A. 7) (Pet. App. D), which involved a government appeal from an order of the District Court for the Northern District of Illinois holding that *Miranda* warnings must be given to any individual taxpayer who is interviewed by revenue agents after his case has been referred to the Intelligence Division of the Internal Revenue Service. The government, without distinguishing between demands on corporate officers for corporate records and requests to individuals for personal statements or records, took the position that a decision by the court of appeals would be applicable to both cases. The court of appeals, accepting this view of the cases, affirmed in *Dickerson* and remanded the present case for further findings and an application of the principle stated in *Dickerson*, *i.e.*, that *Miranda* warnings are required to be given at the outset of non-custodial, pre-arrest interrogations of suspects in criminal tax investigations.

2. On remand, the district court, after evidentiary hearings, found that the case had been referred to the Intelligence Division in February 1964 and that the criminal investigation by the Intelligence Division first began on March 27, 1964 (II R. 12). The court further found that various records were inspected and copied after that date and that the consent of petitioner

Schroering to the inspection had been obtained without his being warned of the true nature of the investigation (II R. 12-14).

On September 21, 1964, the investigating agents had met with petitioner Schroering and the corporations' independent accountant, and the special agent announced that his role was to determine if any criminal violation had been committed (II R. 21). Thereafter, the agents obtained various other records from the corporations with petitioners' consent, but the district court found that such records would not have been voluntarily furnished had the corporations and petitioners known of the "deceit" practiced prior to September 21, 1964 (II R. 27-28). The district court found that the leads acquired by the revenue agent prior to the referral of the case to the Intelligence Division were not duplicative of records examined thereafter because, although the revenue agent testified that he had memoranda of the invoice numbers, he could not recall from memory the detailed contents of the records which he had re-examined during his joint investigation with the special agent (II R. 28).

The district court concluded that the failure of the agents to advise petitioners of their constitutional rights after the case was referred to the Intelligence Division vitiated petitioners' further consent to the inspection and copying of the corporate records (II R. 28-30). The district court therefore suppressed all corporate records and information obtained after the referral to the Intelligence Division and all statements obtained by interviews with petitioner Schroering.

3. The government appealed this order insofar as it applied to corporate records, but, in view of the holding in *Dickerson*, no appeal was taken from the order suppressing personal statements made by petitioner Schroering. The court of appeals reversed, hold-

ing (1) that the government was not precluded from contesting the suppression order as to corporate records by reason of its improvidently broad concession, in the prior appeal, that the facts of this case were indistinguishable from those in *Dickerson*, and (2) that its earlier decision in *Dickerson* did not require that a corporate officer be given advisory warnings before being requested to produce corporate records in a criminal tax investigation of the corporation.

ARGUMENT

1. Petitioners now contend (Pet. 10-15), apparently for the first time, that the corporate records photocopied by the investigating agents were obtained as a consequence of interviews conducted with petitioners in their individual capacities and as such should be suppressed as "fruit of the poisonous tree." This contention fails for two separate reasons.

First, the record does not support petitioners' assertion that leads to corporate documents resulted from statements made by petitioners acting in their individual capacities. To the contrary, all leads to corporate records provided by petitioners stemmed from statements made in their capacities as corporate officers (Pet. App. A, A6). As the court of appeals correctly held, petitioners, as corporate officers, had no right to refuse production of corporate records because they personally might be incriminated by the records. *Wilson* v. *United States*, 221 U.S. 361. Since petitioners had no Fifth Amendment rights to assert in their capacities as corporate officers, *Miranda* warnings were unnecessary even assuming *arguendo* the correctness of the Seventh Circuit's decision in *Dickerson*. Therefore the statements made by petitioners as corporate officers, and the information subsequently obtained on the basis of those statements, are properly

admissible against them and should not have been suppressed by the district court.[3]

Second, the non-custodial, pre-arrest interviews of petitioners did not have to be accompanied by *Miranda* warnings, and any leads provided during such interviews would in any event not have been obtained in violation of petitioners' rights. The Seventh Circuit's rule, stated in *Dickerson*, that such non-custodial interviews must be preceded by full warnings has been correctly rejected in the other circuits.[4] The *Miranda* rule applies only where the interviewed suspect is in physical custody or subjected to some restraint which circumscribes his freedom. Petitioners, by contrast, were never in custody or subjected to restraints.

2. Petitioners also contend (Pet. 15-21) that the court below erroneously ignored the government's prior stipulation that they had standing to raise the motion

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[3]As the court below noted (Pet. App. A, A9), the corporations themselves had no basis for claiming an unreasonable search and seizure of their records.

[4]Every other court of appeals that has considered the question has held that, since the taxpayer is not in custody or deprived of his freedom in any significant way, the requirements of *Miranda* do not apply. *Morgan* v. *United States*, 377 F. 2d 507, 508 (C.A. 1); *United States* v. *White*, 417 F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912; *United States* v. *Jaskiewicz*, 433 F. 2d 415, 417-420 (C.A. 3); *United States* v. *Mancuso*, 378 F. 2d 612, 619 (C.A. 4), certiorari denied, 390 U.S. 955; *Agoranos* v. *United States*, 409 F. 2d 833, 835 (C.A. 5), certiorari denied, 396 U.S. 824; *United States* v. *Miriani*, 422 F. 2d 150, 153-154 (C.A. 6), certiorari denied, 399 U.S. 910; *Cohen* v. *United States*, 405 F. 2d 34 (C.A. 8), certiorari denied, 394 U.S. 943; *Feichtmeir* v. *United States*, 389 F. 2d 498 (C.A. 9); *Hensley* v. *United States*, 406 F. 2d 481 (C.A. 10). The government has consistently opposed certiorari in such cases, notwithstanding the conflict, on the ground that since the Internal Revenue Service now provides full *Miranda* warnings upon the initiation of the criminal investigation the Seventh Circuit rule is rarely of significance.

to suppress, *i.e.*, that they would be aggrieved persons if the corporate records had been illegally seized. See pp. 2-3, *supra.* But this stipulation did not estop the government from contending, as it did below, that the corporate records were validly obtained. The stipulation provided only that if the corporate records had been illegally seized, petitioners as corporate officers would have standing to seek suppression of the records. See *Mancusi* v. *DeForte,* 392 U.S. 364. This concession may have been broader than was necessary, but it did not prevent the court of appeals from holding that the records were obtained legally and reversing the district court's suppression order on that ground.[5]

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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APRIL 1973.

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[5]Petitioners apparently confuse the government's stipulation as to standing with its position, at the time of the first appeal to the court of appeals, that the same principles would apply to the facts of both this case and *Dickerson.* Of course, the government still takes that position and urges that *Dickerson* was wrongly decided. See p. 6, *supra.* However, the position taken by the government at that time should not bar it from now distinguishing *Dickerson.* On this aspect of this case we rely on the opinion below. See Pet. App. A, A5.